Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S8–24–3586 OF 2002
FAIZA TAMBY CHIK J
11 SEPTEMBER 2003.

Civil Procedure — Contempt of court — Order of commital, application for — Committal proceedings — Whether all procedural rules have been complied with

Family Law — Marriage — Validity of — Matrimonial matters — Husband and wife non-Muslim at date of marriage — Husband converted to Islamic faith — Whether committed a matrimonial offence — Whether defendant can file a divorce petition against his unconverted wife — Whether defendant's obligation under Hindu marriage extinguished — Law Reform (Marriage and Divorce) Act 1976 s 51

Islamic Law — Custody — Children — Husband converted to the Islamic faith — Interim civil court order — Hadanah order issued giving custody to husband — Whether binding on non-Muslim wife — Whether it changes the status of the interim civil court order

Islamic Law — Jurisdiction — Syariah Court — Challenge to jurisdiction — Correct approach — Syariah Court issuing a warrant or summon — Whether enforceable against non-Muslims — Whether enforceable against Muslims in another State — Reciprocal arrangements between Syariah Courts

The plaintiff and the defendant were both Hindus at the time of their marriage in 1998. There were two children from the marriage. The defendant converted to the Islamic faith on 19 November 2002 and the two children were converted to the Islamic faith on 25 November 2002 by the defendant alone. Eventually through a sequence of events, the marriage broke down. On 18 December 2002, the plaintiff left the defendant with her two children to her parents' house in Alor Setar, Kedah. On 31 December 2002, the plaintiff filed Originating Summons No S8–24–3586 of 2002, encl (1) seeking an order for custody care and control of her two children. This was served on the defendant on 14 January 2003. The matter came up for hearing for the first time on 16 January 2003. The defendant was present in court on that date and sought for an adjournment on the ground that he needed time to appoint an advocate and solicitor. The court granted the defendant's application for an adjournment to allow him to appoint an advocate and solicitor. The matter was then fixed for hearing on 25 February 2003. On 25 February 2003, the defendant's solicitor filed an application for postponement and this was granted by the court and the matter was postponed to 17 March 2003. In the meantime, the defendant had quietly through his solicitors filed on 7January 2003, an application to the Selangor Syariah High Court for an ex parte hadanah (custody) of the two children. On 9 February 2003, the ex parte hadanah application dated 28 January 2003 was served on the plaintiff. On 27 March 2003, the same Syariah Court issued a warrant of arrest against the plaintiff for failure to attend the said Syariah Court. On 17 April 2003, the court heard the plaintiff's custody application. The defendant

complained about the restricted access he was given by the plaintiff. The plaintiff complained about the warrant of arrest that was issued against her by the Selangor Syariah High Court. The court gave an interim order, giving: (i) access to the defendant on Saturday from 1–2pm, to 1–2pm on Sunday; (ii) the defendant was prohibited from taking the two children out of Alor Star, Kedah; (iii) the defendant husband was to pay RM250 maintenance to each of the two children; (iv) the warrant of arrest issued on 27 March 2003 by the Selangor Syariah High Court against the plaintiff was stayed until the disposal of Originating Summons No S8–24–297 of 2003. On 7 July 2003, the stay order was vacated when the two cases Originating Summons No S8–24–297 of 2003 (encll (1) and (13)) and Originating Summons No S8–24–3586 of 2003 (encl (46)) were fixed to be heard together. Enclosure (46) was an application by the plaintiff for committal proceedings against the defendant when the defendant did not return the two children on 25 May 2003.

Held, allowing the applications:

(1) In converting to Islam, the defendant was regarded as having committed a matrimonial offence thereby enabling the plaintiff who had not so converted to petition for divorce. The defendant by converting to the Islamic faith was in effect converting his marital status from a monogamous marriage to a polygamous marriage. Under s 51 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), the defendant could not file a divorce petition against his unconverted wife who remained a Hindu. She remained his wife though a non-Muslim. As the law, statutory and case law stand today, the defendant's obligation under the said Hindu marriage would not and could not be extinguished or avoided by his conversion to Islam. His wife by Hindu rites remained his wife. He had to support her and the children until and unless the civil marriage was dissolved (see para 10).

(2) When there is a challenge to jurisdiction, as in here, the correct approach is to firstly see whether the Syariah Court has jurisdiction and not whether the State Legislature has power to enact the law conferring jurisdiction on the Syariah Court. Therefore where one Syariah Court issues a warrant or summon under a provision of any law in force in that state, that warrant or summon is unable to be served or executed on any person though professing the Islamic faith who is or is believed to be in another state. This is due to the separate jurisdiction and not having reciprocal arrangements between Syariah Courts (see para 12).

(3) The fact the defendant did not return the two children on 25 May 2003 was in breach of the interim civil court order dated 17 April 2003. This was in contempt of court. The fact that custody of the two children was given to the defendant by virtue of the hadanah order dated 8 May 2003 issued by the Syariah High Court, Selangor did not change the status of the interim civil court order given earlier than the Syariah hadanah order. The interim civil court order was made by a court of competent jurisdiction and was binding on the plaintiff and the defendant equally. The Syariah hadanah order dated 8 May 2003

giving custody of the two children to the defendant was not binding on the plaintiff, a non-Muslim. The Syariah High Court Selangor had no jurisdiction to enforce the order on the non-Muslim plaintiff (see paras 17–18).

(4) As to the commencement of committal proceedings against the defendant, the plaintiff's solicitors had complied with all the procedural rules in respect of committal proceedings. The interim order was made by a court of competent jurisdiction in the present of parties and their solicitors. In point of fact, the defendant obeyed with the terms of the said interim order five times. In any event under r 7(7) of the Rules of the High Court 1980, the court may dispense with service of the copy of the said interim order if it thinks it just to do so. In the circumstances of this case, the defendant had not been acting bona fide (see paras 20–21).

Obiter:

The defendant now a Muslim though cannot file a petition for divorce against his Hindu wife, can take another wife — a Muslim wife because the defendant being a Muslim is now practising a polygamous marriage (see para 13).

[**Bahasa Malaysia summary**

Plaintif dan defendan kedua-duanya beragama Hindu pada masa perkahwinan mereka pada tahun 1998. Terdapat dua orang anak daripada hasil perkahwinan. Defendan telah memeluk agama Islam pada 19 November 2002 dan kedua-dua anak tersebut telah memeluk agama Islam pada 25 November 2002 dilakukan oleh defendan seorang. Akhirnya berikutan beberapa kejadian, perkahwinan tersebut mengalami keruntuhan. Pada 18 Disember 2002, plaintif telah meninggalkan defendan dengan dua orang anak beliau ke rumah ibubapanya di Alor Setar, Kedah. Pada 31 Disember 2002, plaintif telah memfailkan Saman Pemula No S8–24–3586 tahun 2002, lampiran (1) memohon satu eprintah untuk hak penjagaaan dan kawalan kedua-dua orang anaknya. Ini telah disampaikan ke atas defendan pada 14 Januari 2003. Perkara tersebut telah dihadapkan untuk perbicaraan untuk kali pertama pada 16 Januari 2003. Defendan hadir di mahkamah pada tarikh tersebut dan memohon penangguhan atas alasan bahawa beliau memerlukan masa untuk melantik seorang peguambela dan peguamcara. Mahkamah telah membenarkan permohonan defendan untuk satu penangguhan bagi membenarkan beliau melantik seorang peguambela dan peguamcara. Perkara tersebut kemudiannya telah ditetapkan untuk perbicaraan pada 25 Februari 2003. Pada 25 Februari 2003, peguam defendan telah memfailkan satu permohonan untuk penagguhan dan ini telah dibenarkan oleh mahkamah dan perkara tersebut telah ditangguhkan kepada 17 Mac 2003. Sementara itu, defendan telah secara diam-diam melalui peguam beliau memfailkan pada 7 Januari 2003, satu permohonan kepada Mahkamah Tinggi Syariah Selangor untuk satu hak penjagaan ex parte (hadanah) ke atas kedua-dua anak tersebut. Pada 9Februari 2003, permohonan hadanah ex parte bertarikh 28 January 2003 yang disampaikan ke atas plaintif. Pada 27 Mac 2003, Mahkamah Syariah

yang sma telah mengeluarkan satu waran tangkap terhadap plaintif kerana gagal hadir ke Mahkamah Syariah tersebut. Pada 17 April 2003, mahkamah telah mendengar permohonan hak penjagaan plaintif. Defendan telah mengadu tentang sekatan hak lawatan yang diterima oleh beliau daripada plaintif. Plaintif mengadu tentang waran tangkapan yang dikeluarkan terhadap beliau oleh Mahkamah Tinggi Syariah, Selangor. Mahkamah telah membenarkan satu perintah interim: (i) memberikan hak lawatan kepada defendan pada hari Sabtu dari pukul 1–2pm, hingga 1–2pm pada hari Ahad; (ii) defendan dilarang mengambil kedua-dua orang anaknya keluar daripada Alor Star, Kedah; (iii) defendan suami hendaklah membayar nafkah RM250 kepada setiap dua orang anaknya; (iv) waran tangkapan dikeluarkan pada 27 Mac 2003 oleh Mahkamah Tinggi Syariah, Selangor terhadap plaintif telah digantung sehingga selesai Saman Pemula No S8–24–297 tahun 2003. Pada 7 Julai 2003, perintah penggantungan telah dibatalkan apabila kedua-dua kes Saman Pemula No S8–24–297 tahun 2003 (lampiran-lampiran (1) dan (13)) dan Saman Pemula No S8–24–3586 tahun 2003 (lampiran (46)) ditetapkan untuk didengar bersama. Lampiran (46) adalah satu permohonan oleh plaintif untuk prosiding komital terhadap defendan apabila defendan tidak memulangkan kedua-dua anak tersebut 25 Mei 2003.

Diputuskan, membenarkan permohonan tersebut:

(1) Dalam menukar agama ke agama Islam, defendan dianggap telah melakukan satu kesalahan perkahwinan yang membolehkan plaintif yang tidak bertukar agama memohon petisyen perceraian. Defendan dengan bertukar ke agama Islam telah secara langsung mengubah status perkahwinan beliau daripada satu perkahwinan monogamy kepada satu perkahwinan poligami. Di bawah s 51 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) ('Akta tersebut'), defendan tidak boleh memfailkan satu petisyen perceraian terhadap isteri beliau yang tidak bertukar agama yang kekal seorang Hindu. Beliau masih isteri beliau meskipun bukan seorang Muslim. Mengikut undang-undang, statut dan undnag-undang kes masa kini, tanggungjawab defendan di bawah perkahwinan Hindu tidak akan dan tidak boleh dilenyap atau dielakkan dengan penukaran agalam beliau ke agama Islam. Isteri beliau melalui upacara Hindu masih isteri beliau. Beliau perlu menanggung isteri dan anak-anak sehingga dan kecuali perkahwinan sivil tersebut dibubarkan (lihat perenggan 10).

(2) Apabila terdapat cabaran terhadap bidang kuasa, seperti di sini, pendekatan yang betul adalah pertamanya untuk melihat sama ada Mahkamah Syariah mempunyai bidang kuasa dan bukan sama ada Badan Perundangan Negeri mempunyai kuasa untuk menggubal undang-undang memberikan bidang kuasa kepada Mahkamah Syariah. Oleh itu di mana suatu Mahkamah Syariah mengeluarkan waran atau saman di bawah satu peruntukan mana-mana undang-undang yang berkuatkuasa dalam negeri tersebut, bahawa waran atau saman tersebut tidak boleh disampai atau disempurnakan ke atas mana-mana orang meskipun menganut agama Islam yang memang atau dipercayai berada di negeri lain. Ini adalah disebabkan oleh bidang kuasa berasingan

dan tidak mempunyai urusan antara satu sama lain antara mahkamah-mahkamah Syariah (lihat perenggan 12).

(3) Hakikat defendan tidak memulangkan kedua-dua anak tersebut pada 25 Mei 2003 telah melanggar perintah interim mahkamah sivil bertarikh 17 April 2003. Ini adalah satu penghinaan mahkamah. Hakikat bahawa hak penjagaan kedua-dua anak tersebut yang diberikan kepada defendan menurut perintah hadanah bertarikh 8 Mei 2003 yang dikeluarkan oleh Mahkamah Tinggi Syariah, Selangor tidak menukarkan status perintah interim mahkamah sivil yang diberikan sebelum perintah Syariah hadanah tersebut. Perintah interim mahkamah sivil dibuat oleh mahkamah yang mempunyai bidang kuasa yang kompeten dan mengikat plaintif dan defendan sama rata. Perintah Syariah hadanah bertarikh 8 Mei 2003 yang memberikan hak penjagaan kedua-dua anak kepada defendan tidak mengikat ke atas plaintif, seorang bukan Muslim. Mahkamah Tinggi Syariah, Selangor tidak mempunyai bidang kuasa untuk menguatkuasakan perintah ke atas plaintif yang bukan seorang Muslim (lihat perenggan-perenggan 17–18).

(4) Berhubung permulaan prosiding komital terhadap defendan, peguam plaintif telah mematuhi kesemua kaedah prosedur berkaitan prosiding komital. Perintah interim telah dibuat oleh mahkamah yang mempunyai bidang kuasa kompeten di hadapan pihak-pihak trsebut dan peguam-peguam mereka. Secara hakikatnya, defendan telah mematuhi terma-terma perintah interim tersebut sebanyak lima kali. Dalam apa keadaanpun, di bawah k 7(7) Kaedah-Kaedah Mahkamah Tinggi 1980, mahkamah boleh mengenepikan penyampaiakn salinan perintah interim tersebut jika ia fikirkan adil berbuat demikian. Dalam keadaan kes ini, defendan tidak bertindak secara bona fide (lihat perenggan-perenggan 20–21).

Obiter:

Defendan sekarang seorang Muslim walaupun tidak memfailkan satu petisyen perceraian terhadap isteri beliau beragama Hindu, boleh mengambil seorang isteri lagi — seorang isteri Muslim kerana defendan seorang Muslim sekarang mengamalkan satu perkahwinan poligami (lihat perenggan 13).]

Notes

For cases on application for an order of committal, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1500–1512.

For cases on jurisdiction of Syariah Courts, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 517–539.

For cases on custody of children, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 459.

For cases on validity of marriage, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3290–3293.

For application for committal, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.13-151]–[10.13-160].

For custody of children, see 14 *Halsbury's Laws of Malaysia* para [250.393].

For jurisdiction of Syariah Courts, see 14 *Halsbury's Laws of Malaysia* para [250.022].
For validity of marriage, see 8 *Halsbury's Laws of Malaysia* (2003 Reissue) paras [140.176]–[140.220].

Cases referred to

Hunter v Chief Constable of the West Midlands Police & Ors [1982] AC 529 (refd)
Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 (refd)
Pedley v Majlis Ugama Islam Pulau Pinang & Anor [1990] 2 MLJ 307 (refd)

Legislation referred to

Federal Constitution art 121(1A)
Guardianship of Infants Act 1961 s 5
Islamic Family Law (Federal Territories) Act 1984 s 46
Law Reform (Marriage and Divorce) Act 1976 ss 4, 8, 51
Rules of the High Court 1980 O 47 r 7(5), (6)(a), (7), O 52 r 2(2)
Syariah Courts (Criminal Jurisdiction) Act 1965

Revi Nekoo (Parameswary and R Sivarasa with him) (Nekoo Parames & Tung) for the plaintiff.
JT Sambanthan (M Menon with him) (Jaffar & Menon) for the defendant.

Faiza Thamby Chik J:

[1] There are two cases before me today involving the same parties, Shamala a/p Sathiyaseelan, the wife as plaintiff and Dr Jeyaganesh a/l C Mogaraj, the husband as defendant. Both the cases were heard together since I took over on 7 July 2003. In Originating Summons No S8–24–297 of 2003 there are two enclosures. Enclosure (1) is an application by the plaintiff wife praying for:

1 Satu deklarasi bahawa Perintah Ex parte Mahkamah Tinggi Syariah Shah Alam bersamaan kes Mal Bil 10200–028–03/2003 dan/atau mana-mana perintah yang lain dalam presiding yang sama dan/atau mana-mana presiding lain dimana-mana Mahkamah Syariah yang dibawa oleh Defendan tidak mengikat Plaintif kerana Plaintif adalah seorang bukan Islam;

2 Satu deklarasi bahwa Perintah Ex parte Mahkamah Tinggi Syariah Shah Alam bersamaan kes Mai Bil 10200–028–03/2003 dan/atau mana-mana perintah yang lain dalam presiding yang sama dan/atau mana-mana presiding lain dimana Mahkamah Syariah yang dibawa oleh Defendan memberi hak penjagaan Saktiswaran dan Theiviswaran (seterusnya dikenali sebagai 'anak-anak tersebut') kepada Defendan tidak mengikat Plaintif kerana Plaintif sebagai seorang ibu mempunyai hak pemeliharaan sah (legal guardianship) terhadap anak-anak terebut;

3 Lain-lain perintah yang dianggap adil dan sesuai oleh Mahkamah; dan

4 Kos permohonan ini ditanggung oleh Defendan.

[2] The other enclosure is encl (13) which is an application by the plaintiff wife, praying for:

1 Bahawa Defendan dan semua ejen, perkhidmat dan pembantu defendan ditahan daripada memohon kepada mana-mana pihak berkuasa untuk mengambil apa jua tindakan untuk melaksanakan Waran Tangkap yang telah dikeluarkan oleh Mahkamah Tinggi Syariah Selangor menurut permohonan Defendan dalam kes Mai Bil: 10200–028–03/2003 terhadap Plaintif yang bukan seorang beragama Islam sehingga Mahkamah ini membuat keputusan muktamad dalam kes ini atau sehingga keputusan muktamad dibuat oleh Mahkamah Persekutuan berkenaan rujukan khas Mahkamah ini kepada Mahkamah Persekutuan berkenaan kesan Perkara 121(1 A) dibaca bersama Perkara 74 Jadual ke-9 Senarai Ke-2 Perlembagaan Persekutuan; dan

2 Bahawa Waran Tangkap yang telah dikeluarkan oleh Mahkamah Tinggi Syariah Selangor menurut permohonan Defendan dalam kes Mai Bil 10200–028–03/2003 terhadap Plaintif yang bukan seorang beragama Islam digantung perlaksanaannya sehingga Mahkamah ini membuat keputusan muktamad dalam kes ini atau sehingga keputusan muktamad dibuat oleh Mahkamah Persekutuan berkenaan rujukan khas Mahkamah ini kepada Makamah Persekutuan berkenaan kesan Pekara 121(1 A) dibaca bersama Perkara 74 Jadual ke-9 Senarai ke-2 Perlembagaan Persekutuan;

3 Kos permohonan ini;

4 Lain-lain perintah yang adil dan suaimanfaat.

[3] In Originating Summons No S8–24–3586 of 2003, there is one enclosure, encl (46) which is an application by the plaintiff wife praying for:

(a) Bahawa Defendan (suami) dikomitkan ke penjara Sungei Buluh atau mana-mana penjara lain yang difikirkan sesuai oleh Mahkamah di atas:

(i) keingkaran Defendan (suami) memulangkan anak-anak bernama Saktiswaran (4 tahun) dan Theiviswaran (2 tahun) kepada Plaintif (isteri) seperti dikehendaki oleh Perintah Interim Mahkamah Tinggi Malaya bertarikh 17hb. April 2003 yang diberikan melalui Saman Pemula bernombor S8–24–3586–2002 oleh Hakim Mahkamah Tinggi Yang Arif Dato' Md Raus bin Sharif; dan

(ii) keingkaraan Defendan (suami) membayar nafkah sebanyak RM250.00 untuk setiap anak iaitu Saktiswaran (4 tahun) dan Theiviswaran (2 tahun) dengan memasukkan wang ini ke dalam buku akaun simpanan anak-anak seperti yang dikehehdaki oleh Perintah Interim Mahkamah Tinggi Malaya bertarikh 17hb April 2003 yang diberikan melalui Saman Pemula bernombor S8–24–3586–2002 oleh Hakim Mahkamah Tinggi Yang Arif Dato' Md Raus bin Sharif;

(b) Perintah pengkomitan Defendan (suami) ke penjara Sungei Buloh atau mana-mana penjara lain yang difikirkan sesuai oleh Mahkamah terus berkekalan sehingga;

(i) Defendan (suami) memulangkan anak-anak bernama Saktiswaran (4tahun) dan Theiviswaran (2 tahun) kepada Plaintif (isteri) seperti yang dikehendaki oleh Perintah Interim Mahkamah Tinggi Malaya bertarikh 17hb April 2003 yang diberikan melalui Saman Pemula bernombor S8–24–3586–2002 oleh Hakim Mahkamah Tinggi Yang Arif Dato' Md Raus bin Sharif; dan

(ii) Defendan (suami) membayar RM250 sebagai nafkah untuk setiap anak iaitu Saktiswaran (4 tahun) dan Theiviswaran (2 tahun) kepada Plaintif (isteri) dengan memasukkan wang ini ke dalam buku akaun simpanan anak-anak seperti yang dikehendaki oleh Perintah Interim Mahkamah

Tinggi Malaya bertarikh 17hb April 2003 yang diberikan melalui Saman Pemula No S8–24–3586–2002 oleh Hakim Mahkamah Tinggi Yang Arif Dato' Md Raus bin Sharif;

(c) Apa jua perintah lain atau sewajarnya yang diflkirkan patut dan suaimanfaat oleh Mahkamah atas alasan-alasan yang dibentangkan di dalam Afidavit Sokongan yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 26 Mei 2003 (Lampiran 30), Pernyataan di bawah Aturan 52 Kaedah 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980, Afidavit Menentusahkan Pernyataan Di bawah Aturan 52 Kaedah 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 yang diikrarkan oleh Sharmala a/p Sathiyaseelan pada 26hb Mei 2003, Afidavit Tambahan yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 28 Mei 2003 (Lampiran 32), Afidavit Tambahan ke-2 yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 4hb Jun 2003 (Lampiran 35);

(d) Kos permohonan ini, sebarang kos insidental kepada permohonan ini dan kos mengeluarkan dan melaksanakan perintah di bawah permohonan ini dibayar oleh Defendan.

Dan ambil perhatian bahawa pada pendengaran Notis Usul ini Plaintif (isteri) akan menggunakan Afidavit Sokongan yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 26 Mei 2003 (Lampiran 30). Pernyataan dibawah Aturan 52 Kaedah 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980, Afidavit Menentusahkan Pernyataan Di bawah Aturan 52 Kaedah 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 26hb Mei 2003. Afidavit Tanibahan yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 28hb Mei 2003 (Lampiran 32), Afidavit Tambahan ke-2 yang diikrarkan oleh Shamala a/p Sathiyaseelan pada 4 haribulan Jim 2003 (Lampiran 35) yang diserahkan bersama-sama Notis Usul ini kepada Defendan.

[4] This committal proceedings is in respect of the interim order dated 17 April 2003 which states:

ATAS PERMOHONAN PLAINTIF DAN DEFENDAN DAN SETELAH MENDENGAR Encik Sivarasa, Encik Ravi Nekoo dan Cik Paramneswary, Peguam-peguam bagi pihak Plaintif dengan kehadiran Plaintif dan Encik M. Menon, peguam bagi Defendan dengan kehadiran Defendan MAKA DENGAN INI ADALAH DIPERINTAHKAN bahawa sementara menunggu perbicaraan Guaman Sivil No. S8–24–297–2003 Defendan suami diberi akses kepada anak-anak Saktiswaran dan Theiviswaran (seterusnya dikenali sebagai 'anak-anak tersebut') pada tiap-tiap hari Sabtu bermula antara jam 1.00 dan 2.00 petang sehingga jam 1.00 dan 2.00 petang pada hari Ahad dan pengambilan anak-anak dan pengembalian anak-anak tersebut dibuat di rumah Plaintif oleh Defendan DAN ADALAH JUGA DIPERINTAHKAN bahawa Defendan tidak dibenarkan membawa anak-anak tersebut keluar daripada daerah Alor Setar DAN ADALAH JUGA DIPERINTAHKAN bahawa Defendan membayar nafkah sebanyak RM250 untuk setiap anak dengan memasukkan wang ini ke dalam buku akaun simpanan anak-anak tersebut DAN ADALAH JUGA DIPERINTAHKAN SECARA INTERIM bahawa waran tangkap yang dikeluarkan oleh Mahkamah Tinggi Syariah Selangor bersamaan Kes Mal Bil 110200–028–04–2003 tidak dikuatkuasakan sementara menunggu perbicaraan Guaman Sivil No S8–24–297–2003.

[5] I am of the opinion that the civil court has jurisdiction to hear both the cases which involve the same parties concerning the same matter, ie their civil marriage. The fact that the defendant husband has, converted to Islam does not change the status of their civil marriage. The defendant husband's

obligation under the Hindu marriage cannot be extinguished or avoided by his conversion to Islam.

[6] The facts are not in dispute. The plaintiff wife and the Defendant Husband are both Hindus at the time of their marriage. Their marriage was solemnised in a Hindu Temple on 5 November 1998 and registered under the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). There are two children of the marriage, Saktiswaran four years old and Theiviswaran two years old. The defendant husband, converted to the Islamic faith on 19November 2002 and the two children were converted to the Islamic faith on the 25 November 2002 by the defendant husband, alone. I pause here to remind parties about the equality of parental rights under s 5 of the Guardianship of Infants Act 1961 ('Act 1961') which provides that the mother of an infant shall have the like powers of applying to the court in respect of any matter affecting the infant as are possessed the father and in relation to the custody and upbringing of an infant, a mother shall have the same rights and authority as the law allows to a father and the rights and authority of mother and father shall be equal. In this case, the children Saktiswaran and Theiviswaran are still infants under the said Act 1961.

[7] Eventually through a sequence of events the marriage broke down. On 18 December 2002, the plaintiff wife left the defendant husband with her two children to her parents' house in Alor Setar, Kedah. On 31 December 2002, the plaintiff wife, filed Originating Summons No S8–24–3586 Tahun 2002, encl (1) seeking an order for custody care and control of her two children. This was served on the defendant husband, on 14 January 2003. The matter came up for hearing for the first time on 16 January 2003. The defendant husband, was present in court on that date and sought for an adjournment on the ground that he needed time to appoint an advocate and solicitor. The court granted the defendant husband's application for an adjournment to allow him to appoint an advocate and solicitor. The matter was then fixed for hearing on 25 February 2003. It is noted that the plaintiff wife's, solicitors received confirmation on 27 January 2003 from Messrs Jaffar & Menon that they have instruction to accept service of process for the civil suits. On 25February 2003, the defendant husband's solicitor filed an application for postponement and this was granted by the court and the matter was postponed to 17 March 2003.

[8] In the meantime, the defendant husband had quietly through his solicitors Messrs Jaffar & Menon filed on 7 January 2003, an application to Mahkamah Tinggi Syariah Selangor vide kes Mal Bil 10200–028–03/2003 for an ex parte hadanah (custody) of the two children. I think there is suppression of evidence by the defendant husband here as he did not reveal this fact on 16 January 2003 when he applied for an adjournment of the civil case which was granted by the civil court on the ground that he wanted to appoint an advocate and solicitor which is a lie since he had already appointed Messrs Jaffar & Menon on 7 January 2003, the same advocates and solicitors handling his civil suit in the High Court, Kuala Lumpur. The court was misled by the defendant husband on 16 January 2003, when it was already within his knowledge an application for custody in the Syariah Court of the two children

was made on 7 January 2003 by the same advocates and solicitors handling his Syariah and civil suits. On 9 February 2003, the ex parte hadanah application dated 28 January 2003 was served on the plaintiff wife. It is observed that this is the first time the plaintiff wife had knowledge about the ex parte hadanah application in the Syariah Court in Selangor. The plaintif wife then informed her solicitors Messrs Nekoo Parames & Tung about the ex parte hadanah application. It is observed that her solicitors wrote to the defendant husband's solicitors on 13 February 2003 requesting for copies of the cause papers in respect of the ex parte hadanah application. They received the cause papers on 20 February 2003. I must at this juncture briefly state that the exparte hadanah application dated 28 January 2003 is not binding on the plaintiff wife and if served on the plaintiff wife it has no effect because the plaintiff wife is a non-Muslim. The Syariah High Court Selangor has no jurisdiction on parties who are non-Muslim. Although the ex parte hadanah application dated 28 January 2003 was endorsed by the Kedah Syariah Court who has reciprocal enforcement arrangements with the Selangor Syariah Court (exh 'MK-2' in the further affidavit) it still is not binding on the plaintiff wife who is a Hindu and the application is of no effect on her. On 27 March 2003, the same Syariah Court issued a warrant of arrest against the plaintiff wife for failure to attend the said Syariah Court. I cannot understand why the said Syariah Court whose jurisdiction is territorial and over matrimonial disputes involving Muslim marriages only can issue such a warrant. The plaintiff wife is not a Muslim. She is a Hindu. I am of the opinion that it is unconstitutional for the said Syariah Court to issue the warrant of arrest against the plaintiff wife. In any event, the order for warrant of arrest has been stayed by the court on 17 April 2003 pending the outcome of the Originating Summons No S8–24–297–2003. In any event, it is hereby noted that on 7 July 2003 the stay order was vacated when the two cases Originating Summons No S8–24–297–2003 (encll (1) and (13)) and Originating Summons No S8–24–3586 of 2003 (encl (46)) were fixed to be heard together and parties were ordered to summit written submission on those enclosures in the said two cases. The said cases were heard on 15 July 2003 when the court ordered parties to submit further written submission on these enclosures and the said two cases were fixed for decision on 11 September 2003. On 11 September 2003, I allowed the following advocates and solicitors to be present in court. Mr Ang Hean Leng and Encik Malik Imtiaz for the Bar Council, Ms Rasamani Kandiah holding watching brief for the All Women Lawyers Association and Encik Harris Ibrahim holding watching brief for: (a) All Women's Action Society (Awam); (b) Women's Aid Organisation (WAO); (c) Women's Centre for Change (WCC); (d) Sisters in Islam (SIS).

[9] In this case, the defendant husband has converted to Islam on 19 November 2002 under s 51 of Act which, inter alia, provides:

> Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce.

[10] Therefore, the defendant husband is regarded as having committed a matrimonial offence thereby enabling the plaintiff wife who has not so converted to petition for divorce. The effect of the law is that the defendant husband

cannot obtain a divorce at all. The defendant husband cannot obtain a divorce under the Act as s 51 only gives the right to apply for divorce to the party who has not converted to Islam, ie the plaintiff wife. The defendant husband cannot apply for divorce under the Islamic Family Act as the Syariah Court has no jurisdiction to deal with any case where one of the parties is not a Muslim. By way of analogy, it can be noted that although s 46 of the Islamic Family Law (Federal Territories) Act 1984 gives the Syariah Court power to confirm that the conversion to Islam by either party to a non-Muslim marriage may dissolve the marriage, this does not seem to be effective to terminate the marriage as far as the other party is concerned. This is because by virtue of ss 4 or 8 of the Act, such marriage, if valid, shall continue until dissolved: (a) by the death of the parties, (b) by order of a court of competent jurisdiction or (c) by a decree of nullity made by a court of competent jurisdiction. 'Court' is defined to mean the High Court or a judge thereof. Thus in *Pedley v Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307, Wan Adnan J (as he then was) held that '(a) non-Muslim marriage is not dissolved upon one of the parties converting to Islam. It only provides a ground for the other party who has not so converted to petition for divorce.'.

[11] The civil court is established under art 121 of the Federal Constitution. The Syariah Courts are created by State Laws given by Item 1 of the State List in the Ninth Schedule of the Federal Constitution. Their jurisdiction are spelled out in Item 1 of the State List. According to Item 1 of the State List, the jurisdiction of the State Syariah Courts over criminal matters must be conferred by Federal law. The Syariah Courts (Criminal Jurisdiction) Act 1965 provided that the jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof. Since Syariah Courts are established by their respective State laws, their jurisdiction are confined to their respective State territorial jurisdiction over matters relating to Islamic law. By the enactment of the Act A704 of 1988, an amendment to art 121 of the Federal Constitution is made to provide that the High Court and courts subordinate to it shall have no jurisdiction in any matter in which the Syariah Courts have jurisdiction. Harun Hashim SCJ in *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 said at p 800:

> It is obvious that the intention of Parliament by art 121(1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court:
>
> '*Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor*. I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the Syariah Court has jurisdiction and not whether the State Legislature has power to enact the law conferring jurisdiction on the Syariah Court.'

[12] Therefore, where one Syariah Court issues a warrant or summon under a provision of any law in force in that State, that warrant or summon is unable to be served or executed on any person though professing the Islamic faith who is or is believed to be in another State. This is due to the

separate jurisdiction and not having reciprocal arrangements between Syariah Courts.

[13] What is before me is a dispute involving a Hindu marriage between the plaintiff wife and the defendant husband entered into on 5 November 1998. As the law, statutory and case law stand today, the defendant husband's obligation under the said Hindu marriage will not and cannot be extinguished or avoided by his conversion to Islam. His wife's application is under the Act. The defendant husband by converting to the Islamic faith is in effect converting his marital status from a monogamous marriage to a polygamous marriage. Under s 51 of the Act, the defendant husband cannot file a divorce petition against his unconverted plaintiff wife who remains a Hindu. She remains his wife though a non-Muslim. Only she may petition for divorce on the ground that the defendant husband has committed a matrimonial offence by his conversion to Islam. I am of the opinion that the defendant husband, now a Muslim though cannot file a petition for divorce against his plaintiff Hindu wife, can take another wife — a Muslim wife because the defendant husband being a Muslim is now practising a polygamous marriage. His wife by Hindu rites remains his wife. He has to support her and the children until and unless the civil marriage is dissolved and the petition for dissolution of that Hindu marriage may only be presented by the unconverted wife under s 51 of the Act. The word used in the Section is 'may', ie to maintain the status of the civil marriage (Hindu marriage) if the unconverted wife wishes to remain the wife of her converted husband although the converted husband can take another wife if he can do justice as the Holy Quran *Al-Nisa* (IV) Ayat 3 states and which reads, 'if ye fear that ye shall not Be able to deal justly With the orphans, Marry women of your choice, Two, Three or Four; But if ye fear that ye shall not Be able to deal justly (with them), Then only one, or (a captive). That your right hand possess, That will be more suitable, To prevent you from doing injustice.' (see the meaning of the *Glorious Quran Text*, translation by Abdullah Yusuf Ali, p 100). It is instructive to note that when the reform bill to cl 51 was introduced in Parliament the Deputy Minister for Law, Datuk Athi Nahappan said:

> The purpose of this, as I understand it, is that if a non-Muslim husband becomes a Muslim, then what is to happen to the wife? Now she has more than one choice. She can convert herself, if she wishes, in which case both the husband and wife, even under the Islamic law, are allowed and they are recognized as Muslims. Under the Islamic law, on the other hand, she can wait for about three menstruation periods, roughly about three months, and during that time she can consider whether she wishes to become a Muslim.
>
> The provision here gives a discretion. It only uses the word 'may' petition for divorce. It does not make it mandatory on her to part to break away from her husband merely because he has changed religion, but it gives her the option to join the Islamic religion with her husband or remain out of conversion. If she merely remains as a wife — under the law she remains to be a wife — because under this law she is not technically divorced. She stands married to her husband. Under s 3 of the Maintenance of Married Women's and Children's Ordinance 1950, she is entitled to maintenance. So are her children. But it is not very clear, as it stands, whether she would be entitled to maintenance under this Bill, as has

been rightly raised by the Honourable Member for Telok Kemang. So the right that is given to the wife, Tuan Yang Di-Pertua, is a discretion. She 'may' exercise it, she 'may not' exercise it. But this has been given as a ground. If she wants, she can seek a divorce and in which case the normal rule, as provided in cll 50 and 55 would not be applicable — she does not have to wait two years to file her petition for divorce. She is given three months to ponder over it. That is the rationale of the three months mentioned in the proviso to cl 51. The word 'Islam' is mention there — itis unfortunate, I only assume that this was put in there because there is a situation here of two types of marriages in this country when this become law. One type is the polygamous system and the other type would be the monogamous system. The monogamous system would cover nearly half the population and would cover the non-Muslims except the natives of East Malaysia and the aborigines of West Malaysia. So by and large, the non-Muslims would be adopting the monogamous system under this law and the Muslims will continue under their religious law. So the possibility of converting to a polygamous system in this country can only be from any one of the existing religions like Hinduism or Buddhism or Christianity — from one of these into Islam which allows the polygamous system. So in order to be precise, the word 'Islam' has been put in here in so far as Malaysians are concerned and within the context of our country. I am sure our Government would never, never do anything anywhere and particularly in a legislation to derogate the Islamic religion because it knows that Islam is the State religion and we have the greatest of respect for that religion and it is not the intention at all. The intention is merely to provide clarity, to show the juxtaposition of the two sets of religion which would provide two types of marriages in this country (see *The Administration of Islamic Law in Malaysia* by Ahmad Ibrahim, pp 351–353.)

[14] The plaintiff wife filed an Originating Summons No S8–24–3586 of 2002 in encl (1) and an affidavit in support in encl (2) seeking for an order for custody, care and control of her two children and this application was served on the defendant husband on 14 January 2003. The matter came up for hearing for the first time on 16 January 2003. The defendant husband came to court and sought for an adjournment on the ground that he needs time to appoint a solicitor. The court granted the defendant husband's application for an adjournment to allow the defendant husband to appoint a solicitor. The matter was fixed for hearing on 25 February 2003. In the meantime, the defendant husband had through his solicitors Messrs Jaffar & Menon filed an application in the Selangor Syariah High Court vide Kes Mal Bil 10200–028–03 of 2003 for an ex parte hadanah of the two children on 7January 2003.

[15] This fact was not made known to the civil court when the defendant husband appeared in court on 16 January 2003. It is noted that on 27 January 2003, solicitors for the plaintiff wife, Messrs Nekoo Parames & Tung received confirmation from Messrs Jaffar & Menon that they have instructions to accept service of process. Enclosure (1) is the plaintiff wife application seeking for an order for custody, care and control of her two children which came up for hearing on 12 April 2003. A preliminary objection was raised by the defendant husband's solicitors on the jurisdiction of the civil court to hear the custody application. The court heard arguments of both counsels and on 4 April 2003 decided that the civil court has jurisdiction to hear the matter. The defendant husband has since filed an appeal to the Court of Appeal. The court then fixed the matter for hearing on 17 April 2003. In the meantime, the ex parte hadanah application dated 28 January 2003 from the Selangor

Syariah High Court was served on the plaintiff wife by the defendant husband on 9 February 2003. On 27 March 2003, the same Syariah High Court issued a warrant of arrest against the plaintiff wife for failure to attend the said Syariah Court. On 17 April 2003, the court heard the plaintiff wife custody application. The defendant husband complained about the restricted access he is given by the plaintiff wife. The plaintiff wife complained about the warrant of arrest that was issued against her by the Selangor Syariah High Court. The court gave an interim order, giving: (i) access to the defendant husband on Saturday from 1–2pm, to 1–2pm on Sunday; (ii) the defendant husband is prohibited from taking the two children out of Alor Star, Kedah; (iii) the defendant husband is to pay RM250 maintenance to each of the two children; (iv) the warrant of arrest issued on 27 March 2003 by the Syariah High Court, Selangor against the plaintiff wife is stayed until the disposal of Originating Summons No S8–24–297 of 2003.

[16] The defendant husband was allowed to take the two children from the plaintiff wife's house in Alor Setar on Saturday and returned them on Sunday. This the defendant husband did on five different occasions in compliance with the interim order. This is as follows:

Saturday (time)	Sunday (time)
19.4.2003 — 1.05pm.	20.4.2003 — 1.10 pm.
26.4.2003 — 1.23 pm.	27.4.2003 — 1.25 pm.
3.5.2003 —1.05pm.	4.5.2003 — 1.20 pm.
10.5.2003 — 1.15pm.	11.5.2003 — 1.16 pm.
17.5.2003 — 1.05pm.	18.5.2003 — 1.30 pm.
24.5.2003 — 1.00 pm.	(did not return the two children)

[17] On 23 May 2003, the plaintiff wife received by courier an order dated 8 May 2003 from the Selangor Syariah High Court giving hadanah (custody) of the two children to the defendant husband. I must stress here that the fact the defendant husband did not return the two children on 25 May 2003 is in breach of the interim civil court order dated 17 Aprii 2003. This is in contempt of court. The fact that custody of the two children is given to the defendant husband by virtue of the hadanah order dated 8 May 2003 issued by the Selangor Syariah High Court did not change the status of the interim civil court order given earlier than the Syariah hadanah order. The interim civil court order is made by a court of competent jurisdiction and is binding on the plaintiff wife and the defendant husband equally.

[18] As to the Syariah hadanah order dated 8 May 2003 giving custody of the two children to the defendant husband, I am of the view that that hadanah order is not binding on the plaintiff wife who is a non-Muslim. The Syariah High Court Selangor has no jurisdiction to enforce the order on the non-Muslim plaintiff wife, Again it is only effective within the jurisdiction of the Syariah High Court which is in the State of Selangor only. Even if the hadanah order dated 8 May 2003 is endorsed by the Kedah Syariah Court like the exparte hadanah application dated 28 January 2003 (see exh 'MK-2') it is still not

binding on the non-Muslim plaintiff wife. What more in this case, I observe that the said hadanah order is not so endorsed by the Kedah Syariah Court.

[19] On 27 May 2003, the plaintiff wife filed an application for leave to commence committal proceedings (encl (29)) against the defendant husband on the basis that the defendant husband had failed to comply with the interim order dated 17 April 2003, when he failed to return the two children to the plaintiff wife on 25 May 2003 and took them out of the Alor Setar district and failed to pay RM500 for the maintenance of the two children. The matter came up for hearing on the 30 May 2003. The court had wanted to know what transpired in the Syariah High Court Selangor and hence it was adjourned to 6 June 2003. Subsequently, the plaintiff wife filed an second supplementary affidavit affirmed on 4 May 2003 exhibiting the notes of proceedings of the Selangor Syariah High Court as well as the various letters that were sent to the said Syariah High Court and to the defendant husband's solicitors by the plaintiff wife solicitors. I observe that the plaintiff wife solicitors have complied with the procedural O 52 r 2 of the Rules of the High Court 1980 ('the RHC'). A fair copy of the interim order dated 17April 2003 was filed and served on the defendant husband's solicitors on 27 May 2003. A copy of the notice of motion (ex parte), supporting affidavit, statement under O 52(2) of the RHC and affidavit verifying the staement under O 52(2) of the RHC together with the supplementary affidavit and second supplementary affidavit were served on the defendant husband's solicitors on 2 June 2003. A copy of the interim order dated 17 April 2003, notice of motion (ex parte), supporting affidavit, statement under O 52(2) of the RHC with the supplementary and second supplementary affidavit were served on the defendant husband on 4 June 2003. An affidavit of service was filed on 5 June 2003. It is noted that the nature of the contempt is clearly set out in the suppoting affidavit as well as in the satement under O 52(2) of the RHC. On 6 June 2003, the defendant husband and his solicitor MrJT Sambanthan were present in court at the hearing of the plaintiff wife's application for leave to commence committal proceedings against the defendant husband. On that day, the court granted the plaintiff wife leave to commence committal proceedings against the defendant husband. Subsequently, the notice of motion to commit the defendant husband to prison was filed on 10 June 2003.

[20] As to the commencement of committal proceedings against the defendant husband, I observe that the plaintiff wife's solicitors have once again complied with the procedural O 52 r 2 of the RHC. The order giving leave to commence committal proceedings dated 6 June 2003 was filed on 20 June 2003 and served on the defendant husband on 24 June 2003. The notice of motion filed on 10 June 2003, supporting affidavit, statement under O 52 r 2(2) of the RHC and affidavit verifying the statement under O 52 r 2(2) of the RHC together with the supplementary affidavit and second supplementary affidavit were served on the defendant husband on 24 June 2003 and on his solicitors on 26 June 2003. An affidavit of service was filed on 27 June 2003.

[21] Solicitors for the defendant husband submitted that the committal proceedings is defective for procedural non-compliance. I disagree with the said submission. It is plain that on 6 June 2003 the defendant husband and his solicitors were present in court and no objection was raised either by the

defendant husband or his solicitors. Order 45 of the RHC provides in gist that under r 7(5) it requires a copy of the order to be served. And r 7(6)(a) states that an order need not be served if the person against whom it is sought to enforce the order has had notice thereof by being present when the order was made. In this case, the defendant husband and his solicitors were present in court when the said interim order was made. In point of fact, the defendant husband obeyed with the terms of the said interim order five times. In any event under r 7(7), the court may dispense with service of the copy of the said interim order if it thinks it just to do so. In the circumstances of this case, I come to the conclusion that the defendant husband has not been acting bona fide. Azmi SCJ in the Federal Court case of *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 at p 807 citing Lord Diplock in the case of *Hunter v Chief Constable of the West Midlands Police & Ors* [1982] AC 529 at p 536 applied the same principle and said, '... it is difficult to imagine how the administration of justice can be served if the parties are allowed to abuse the process of court by hopping from one jurisdiction to another over the same subject matter.' No doubt that the defendant husband is now a Muslim and have obtained certain orders in his favour from the Selangor Syariah High Court but the fact is, those said orders are not binding on the plaintiff wife who is a non-Muslim. But the defendant husband though a Muslim still owes obligation under his civil (Hindu) marriage with the plaintiff wife and these marital obligations will not and cannot be extinguished or avoided by his conversion to Islam. The civil (Hindu) marriage is very much alive unless and until it is brought to an end by the plaintiff wife, The defendant husband who is now a Muslim cannot do anything. The plaintiff wife will be his unconverted wife so long as she wants to be. That is the effect of conversion to Islam on a civil marriage under s 51 of the Act. What is worse here is the effect of s 51 is that the defendant husband who has converted to Islam cannot obtain a divorce at all. I come to the conclusion that the defendant husband has full knowledge of the said interim order. He also has complied with the terms of the said interim order five times. The interim order was made by a court of competent jurisdiction in the present of parties and their solicitors. All procedural rules in respect of committal proceedings have been complied with. I must do my duty in accordance to laws passed and intended by Parliament, otherwise it would prejudice the minds of the general public against the courts.

[22] For these reasons, I grant order in terms of both the plaintiff wife's application in encl (46) of Originating Summons No S8–24–3586 of 2002 and also in her applications in encls (1) and (13) in Originating Summons No S8–24–297 of 2003.

Application allowed.

Reported by Sally Kee Seok Meng